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The Ins and Outs of the Legal Profession

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THE INS AND OUTS OF THE LEGAL PROFESSION

By Justice Haslett P. Burke of the Supreme Court of Colorado

Address Before the Denver Bar Association, Delivered October 6, 1930

MR. PRESIDENT, Ladies and Gentlemen of the Denver Bar: I appear here today with considerable reluctance, and only after repeated invitations from your President and his predecessor, with their expressed conviction that I might be able to say something which would promote that confidence and mutual helpfulness between bench and bar so essential to the administration of justice.

Let me first revert to my subject, because, as Chauncey Depew used to say, it will not be mentioned again in the course of my remarks. It has no relation to the daily trials and tribulations of a lawyer, his professional victories and defeats, or the sliding scale of his compensation. Its applicability is to that devious and difficult pathway up which he climbs to the law, and the broad, smooth pavement down which he slides to professional extinction. Dryden, translating and elaborating Virgil, says:

> "The road to hell is open night and day,
> Smooth the descent and easy is the way."

As your President has said, we have here as our guests today the survivors of the last conflict between applicants for admission, and the bar committee and the court. It was almost as disastrous as the Charge of the Light Brigade. Seventy-one entered that contest. The committee recommended the admission of but 41, and five of those only under a suspension of one of their rules. The court was unable to approve of that suspension, so the number actually admitted was 36. That high rate of mortality has caused some surprise, and the opinion has been expressed that the test must have been unduly

severe or the examiners unnecessarily cruel. Neither is true. We are, in fact, much more saddened by such a result than the disappointed applicants can be. They look at it from the standpoint of the individual, we from the standpoint of the mass. Think for a moment, if these 35 aspirants who failed should now abandon their ambitions and turn their attention to other pursuits. Assume that they have each spent three years in preparation for the law, at an annual outlay of $600, and that the accumulations of those years will be valueless in the activities in which they now engage. There has then been squandered more than $60,000 of treasure, and over a hundred years of human life—and money is so scarce and life so short. Can anyone suspect that, with a consciousness of such possible results, the members of the committee or of the court will always feel perfectly confident of the correctness of their judgments? "Thy memories, Power, are solemn."

I wish you to bear in mind that there is no crying demand for a new supply to fill the depleted ranks of this profession. This country has more lawyers than can possibly be absorbed in its business. In the United States the average ratio to population—and all these figures I give are approximations, because I speak from memory—is 1 to 800, according to the latest available figures. The average ratio in Colorado is 1 to 600. And that condition is getting worse. Among the most deplorable conditions are those to be found in the States of New York and California. In the great State of Pennsylvania there are only half as many lawyers per population as in Colorado. We know, from the observations of years, that out of every large class that starts to travel this road, perhaps fifty per cent are doomed to failure from the start. I trust there may yet be found a way to at least sound a warning before these hopeless ones enter upon an expenditure of time and money in preparation for a profession for which they are wholly unfit. Many of them soon fall by the wayside. Others are literally worn out in the struggle and quit. Others hang on to old age, living upon a pittance. Somebody ought at the start to point out the rocks in this highway, and I fear that it is up to the courts of last resort of these states, and their committees, to perform that duty.

Let me tell you a story. Our rules, as you know, provide

that one who has failed to pass an examination may take the next. If he then fails he must wait for a year. If he fails again he can return only by special permission of the court. Not so long ago we had a case of that kind. The court, as you perhaps know, has a committee on admission and discipline, of which at that time Judge Denison and I were the members. The court directed us, when this young man's application was made, to have a conference with him and report whether, in our judgment, he ought to be permitted to take another examination. He came to this city and we spent some two hours with him. Near the close of that conference I put to him this question: "I wish you would give me the title of a book which is a favorite of yours, the name of its author, and tell me whether it is poetry, philosophy, essays, biography or history. It must not be a law book." He was 27 years old. He floundered for quite a time, but finally gave the names of some books and some authors. In some instances he connected these correctly, in some he guessed the subject of the volume, but in no case was he correct on title, author and subject. What hope can there be in this profession for one who comes to it at such an age so equipped?

Twenty-four years ago a rule was passed by the Supreme Court of this State specifying certain qualifications which one must have to be permitted to take an examination for admission to the bar. They were very brief, but one of them was that he must have studied law, some place, for three years. Twenty-four years ago that was a long step in advance of most of the states of this Union, and great credit is due the men who established those regulations. Those rules remained unchanged for a quarter of a century, in face of the advance that was made throughout the Union. We found this condition when the rules of 1924 were passed. One, if he had no certificate or diploma from a recognized educational institution, might take an examination before the State Superintendent of Public Instruction in seven specified subjects, at the time when an examination was given for certificates to teach school. But there was no relation between these subjects and the other subjects upon which the State Superintendent or her assistants examined applicants. There was no provision as to whether one question or a thousand should be asked, or one per cent or

one hundred attained. Good character was to be determined in one instance by a certificate, not even an affidavit, to that effect from some lawyer in the town where the applicant lived. In another, by "other satisfactory evidence."

You know the program, backed by the American Bar association and supported by the profession and the public generally, for a raising of these standards. Your court and its committee have endeavored to set such standards in Colorado as shall represent the ideals of the best men in a great profession. In the face of what I have said, it is folly to hope or wish that these standards will be lowered, or that it will be any easier to make the hurdles in the future than it has been in the past. In fact, I think you may reasonably expect the contrary. At least one of the states and two Canadian provinces now require a college degree as a prerequisite to the study of law, and my guess is that the time is not far distant when that requirement will be made in this jurisdiction. Whoever comes to the practice of the law with no education outside of that required to pass an examination in legal subjects can never hope to be anything but a hewer of wood and a drawer of water. There is no knowledge a man can acquire that will not be of service in this profession. But he must know something of the appearance and disappearance of races, of the rise and fall of nations, of the development and decay of civic and social institutions, since mankind first came out of the mists. Above all, he must have some comprehension of the wonders wrought by words, some inkling of the beauty and power of that noble literature whose source lies back of Homer, and whose currents have bathed with glory every civilization that has ever been worthy to live. For myself, I do not care how or where a young man acquires knowledge and character. It may be in school or college or university, in shop or field or mine, or by the lonely lamp of the humblest cottage in this land. The question is, how are we to find out that he has them? The court has no machinery to do the work and no facilities for creating it. It is folly to say that even so able a committee as ours could ascertain those things in two or three days' examination. Hence, we have established schools as the proper agencies to make the test, and where there is a doubt we place the responsibility where it ought to rest, upon the great Uni-

versity of the State of Colorado. I know very well a man may haunt the classic halls of learning acquiring honors and degrees until, in the language of Holmes, his name

" * * * may flaunt a titled trail
Long as a cockerel's rainbow tail,"

and yet remain a knave and a fool. On the other hand, that name may

" * * * as brief appendix wear
As Tam O'Shanter's luckless mare,"

and the owner of it be a saint and a sage. But the overwhelming probabilities are against such conclusions, and, excepting in the science of mathematics, all we can deal with in this world is probabilities. So when a boy comes knocking at the doors of this profession it should be with the presumption in his favor that he has both the character and intellect which the completion of a university course naturally implies.

So much for the "ins" of the profession. Let me talk to you a little about the "outs".

In order to do that, I am going to divide the history of this state into two periods, the first fifty years of her existence and the last four. You know we have a grievance committee that seems to have been a little active in these the last few years, and I am told that some members of the bar whose footprints have been found too close to the border of the reservation, have raised the question, why all this new machinery, and why all this tampering with ancient privileges? Let us answer that. In the first fifty years of Colorado's history there were 41 proceedings in discipline filed in the Supreme Court of this state. In order that you may better understand the situation, I should add that during the first 22 years there were none. If that raises in your mind the supposition that learning was so profound and ethical standards so high during those days that no such proceedings were necessary, then just avail yourselves of the opportunity to join some of the veterans of the profession who lived here in those days, when they are at ease around a pleasant hearth some evening, and listen to their stories, and you will come to the conclusion that the only offense for which a man would have

been disbarred in those days was unprovoked murder (laughter), and that if he committed one they just took him out and hung him and obviated the necessity of proceedings in disbarment. That is no reflection, remember, upon that generation. It furnished us something we can no longer furnish for ourselves. There was a condition of civilization here on the crest of the continent which soon buried incompetents, and brought ability and genius and character to the surface, and placed upon them the stamp from which we may know the gold. Those times have changed; we must supply that process with something else. They began to supply it themselves 22 years after the admission of the state. Then came, between then and 1926, these 41 proceedings in discipline in the Supreme Court. They reveal a very interesting history, and I recite the facts to you purely as a matter of history. Far be it from me to place the blame, if they carry blame, upon the shoulders or court or counsel or bar, or even to suggest that there was cause for censure. We are not much concerned with it now, because those fellows belong to a day that has long since passed into history.

Out of the 41, one was suspended and 22 disbarred. I will not go into the various methods by which the others passed from the memory of man. Of the 22 who were disbarred, six were later reinstated. The longest any one of the six was out was six years. Two were out for five years, one for three years, and one never got to draw a breath outside the profession, because the opinion of the court which disbarred him reinstated him. In one instance it took three years and seven months from the date of the filing of the information to reach final judgment of disbarment, and the respondent was reinstated in three years and four months. I will not go into the time taken for these hearings, except to tell you that the average time consumed in the 23, between information and judgment, was two and one-half years.

Note now the cases of some respondents who never reached the ultimate disaster. One was pending for 14 years, another for 11 years, another for 20 years. Five of these men died awaiting final disposition of their cases. One case stood at issue for 14 years, and was finally dismissed by the court for want of prosecution. Another stood at issue for 20 years, and

was finally dismissed by the court for want of prosecution. In another a motion for additional time to take evidence was denied in 1902, and the case is still undisposed of on the docket of the court.

Contemplating the history I have just recited, and remembering that lawyers as a class have not always been so popular as to tax the vocabularies of those who constantly sought to pay them tribute, is it not self-evident that more careful attention to the affairs of its own household was demanded of the bar of Colorado?

I call your attention to another interesting fact: although from the date of the admission of Colorado to statehood the duty has devolved upon the Supreme Court of this State to govern its bar, admit, discipline, and disbar, and although that tribunal has been ostensibly vested with that power over a group of men now grown I think to something like 2500, and composed, if their detractors may be credited, of as desperate and shifty a group of individuals as ever lived, the elderly, peace-loving gentlemen who have comprised that tribunal have never been furnished with a horse or a weapon or a penny with which to discharge that desperate duty. How any one should imagine, up until recent years, that it were possible for the court to so function, it is impossible for me to understand. About 1924, by rule, the court levied a per capita tax, known as an examination fee, of ten dollars per head upon all applicants for admission to the bar, and made it impossible to obtain a refund. Out of those fees it created a fund which it devoted to examinations, admissions and discipline. So the court is not quite so helpless as it used to be. No rule of court had been passed during all those preceding years, and no statute had been passed, directing how that tremendous power should be exercised, or under what circumstances, except in a single instance. Prior to 1922—the oath taken was simply an oath to obey the constitution and discharge the duties of office to the best of the applicant's ability. In 1922 the present oath was prescribed by rule. It has an interesting history. You know that it was recommended by the American Bar Association; the American Bar Association took it from the Territorial laws of Washington of 1863; Washington got it from the Swiss Cantons of Geneva, and you will find its substance

in briefest language in the Code of old King Christian 5th of Denmark and Norway, under date of 1683. How much further back you may follow it I am not able to say. Eighteen months after it was prescribed its obligation was, by an amendment of the rule, cast upon every member of the bar in this jurisdiction, the rule providing that any conduct inconsistent with its principles should be cause for discipline. Then for the first time some rules were adopted concerning the discipline of allegedly recreant lawyers. The Grievance Committee of the State Bar Association, your committee, was adopted by the court as one of its arms for that purpose, and its procedure, where it so acted, roughly outlined. It was the first long step toward bringing into closer contact, into working harmony, the courts of this state and the bar of this state, and its tendency has been to bring in the trial courts of the state as well, I assure you.

Before I pass to the work of that committee, just a word about rumored criticism of the results. Since this so-called Code was enacted, there seems to have gotten abroad among certain members of the bar an impression that there is now no other method of proceeding against a lawyer for offenses against the courts, the people or the profession. It seems to me there could not be a greater fallacy. What was the condition before that rule was adopted? The court was authorized by statute to strike from the rolls the name of any lawyer guilty of mal-conduct in office, and that was the end of the regulation. How the matter should be presented to the court, how the court should act, what kind of a hearing should be given, was all a white page. Not even a disbarable offense was specified, except the one mentioned in the Territorial statutes of 1861, that if an attorney refused to pay money to his client which belonged to the client, his name should be stricken from the rolls. And the language of the act was, if he had "neglected" to pay the money. Of course it seems clear that there were numerous ways to proceed in those disbarment cases before these rules were passed. Let us take two of them, we need not notice others. This territorial statute simply provided that if the neglect was called to the attention of the court, it might by rule require the attorney to show cause why his name should not be stricken. That was all there was to that

procedure. Certainly up until these new rules were adopted, one way of proceeding against a lawyer was by affidavit filed with the court, which would set the rule in motion. Now, another way unquestionably was, at least it has been repeatedly followed, by record, if a court record disclosed misconduct. Suppose, for instance, that briefs are filed in the Supreme Court, and upon an examination of them we find that the president of your Association has filed a brief on each side of the case, that he has appeared for the plaintiff in error and for the defendant in error. What is there to refer to a bar association? What is there to refer to a grievance committee? What is there to require an affidavit? So I assume that there were at least two recognized methods of procedure, one by affidavit and one by rule, to show cause on a matter that appeared of record. We know also that before that time people filed complaints with the State Bar Association. Those complaints were referred to the Grievance Committee, and were there threshed out. Sometimes they heard the respondent, maybe always heard him, and eventually, coming from the Grievance Committee those cases reached the court in substantially the same condition they would have reached it had some private individual of his own motion filed the affidavit direct. Now, since there is not a word in the rules about the method there laid down being an exclusive method, I opine that these other methods which existed before the adoption of the rules still exist. Are they hard? Are they unjust? They may be. And because they may be, you may naturally expect that the court would, as it does, resort to them now only in cases of emergency. But are they harsher than other necessary rules of law? A man may be required, without an opportunity to be heard, without a perfectly valid defense which he has ever being presented—he may be required publicly to show cause why he should not be disbarred from the practice of his profession for an apparently heinous offense. And that is sad, if it ever happens. But the same man may, upon identically the same showing, be called into a trial court to answer a charge of murder, on an information filed by a district attorney based upon an affidavit of a man whom the defendant considers, and many other people consider, absolutely unworthy of credence. So district attorneys, if they are good

prosecuters, are very careful about how they exercise that tremendous power; and I should venture the suggestion that if, as I have indicated, the power exists, the Supreme Court of Colorado will never exercise it except in cases which seem to it to imply necessity.

Now, what has your Committee been doing since it was adopted as one of the arms of the court? It has had 16 cases to handle that have come to public attention by reason of finding their way into the court records. In five of those cases there have been entered judgments of disbarment; in two of them reprimands by the court; in two suspensions. Six are still pending. What about those that have been disposed of? I am not going into details as to each one, but the record discloses that the average time elapsing from the date of the filing of the information to the date of the judgment has been four and one-half months. In addition to those, there have been reprimands in one or two instances, one that I recall at least, by some member of the court for the court, in a case that never came to the attention of the Bar Association or its Grievance Committee, until perhaps three or four days ago, when I told the story to the present President of the State Bar Association. There have been numerous instances in which a proper admonition was given by the Committee, or one of its officers, and the proceeding never became a matter of record, even before the Committee.

You will be interested in knowing too, that in approximately ninety per cent of the cases filed with the Grievance Committee, that is, letters written or complaint made, no action is ever taken publicly; they end there. Young men who have made a false step; men whom financial distress has caused to commit minor offenses; men with otherwise excellent records. I know of their existence only by the report to me generally of the Secretary of the Committee. It is interesting also to know that in approximately 98 per cent of the cases filed, whether they become public or not, the offense charged is an offense involving money, cases where lawyers have withheld money from their clients for an unreasonable length of time, probably used it; young men walking unfamiliar paths, worried over where tomorrow's meals are coming from, have taken business which they never ought to have taken, or

attempted to improperly prosecute business properly taken. They are tragedies to move a heart of stone; they are enough to make every self-supporting, reasonably equipped member of this bar devote some of his time and some of his thought to reducing the probabilities that men will enter upon a profession for which they are wholly unfitted by nature and by education, and in which they must fall into trouble. The fault is not theirs; the fault lies with the system; it lies with the law schools, that take their money when they never ought to take their money; it lies with colleges and universities, that graduate these men in order to get them out where they have stayed too long; it lies with the inefficient machinery which we have been able to set up thus far to determine who has the qualifications to enter upon the practice of this great professon.

Now, I must begin to close. Why all this fuss? We constantly hear of the ancient power and prestige of the bar and its modern decadence. I doubt a dood deal of it. Because, as you look into the distance, only the mountain peaks loom up. In your immediate vicinity the foothills shut off the main range. I have no doubt that those of us who live 30 years from now will point out the giants in this gathering to their successors, and tell those successors stories of the golden days of the profession that have forever passed. But there are troubles. The wisest and most truthful of our elders tell us that the path has twisted too much and has been turning downward. If so, we must about face and begin to climb again. That means that all of this work must be done by someone. It cannot be done alone by a court or a committee. It is just as useless to attempt it as it is to attempt to move the Rocky Mountains. It is work for the bar as a whole in a great jurisdiction, a bar that has some pride in itself, pride in its history, hope for its future. Nobody else can do it. The committee, your committee, the court, your court, must have these matters understood by you, and have the support of the best character and the best brains at this bar. What does your court wish to do? I think I can best tell you by repeating what I said to a young man who had stepped aside from the path of rectitude, and whom, out of great tenderness, the court was trying to win back without disgrace. When he asked me what the hope of the court was, I said, the court, if possible, would have the bar

of Colorado so conduct herself that when one of her members stands up in any court in the civilized world, and it is known that he comes from this jurisdiction, every presumption as to his character, his learning and his ability will be instantly indulged. It may be an idle dream, I know, but I would have a certificate of admission to the bar in Colorado coveted and treasured as a patent of nobility.

A COLLECTION

The following letter by a Justice of the Peace was received in the regular course of business by the client of a Denver attorney:

West Monroe, La., 2nd April, 1924.

Shipman-Ward Mfg. Co.

Gentlemen:

I am once more sending you papers in the matter of Miss ..... This woman has given me more trouble to try and collect money from than any person I ever tried before. Last summer I traced her all over the United States before I could locate her. And now she has gone again and I have enough and am quitting her trail, and am going to start you after her. Last fall some time she paid me ten dollars on her account and SWORE that she would pay me ten dollars per month until it was all paid. But she Lied instead of paying. She got MARRIED and left. I never saw the man she married but I know that he is a sorry cuss. I traced them up and wrote to him and her and I know that both of them got my letters for they never came back, but they never answered my letters, paid no attention to them and any man that would do that is a dam rascal. I am sending you check for five dollars, out of the ten. I would not go through with what I have done trying to collect, what I have for ten dollars much less five. JUST as soon as you get this I want you to get some one right after them and push it. GIVE them all the worry and trouble you can. I am sending you a letter that a friend of mine sent me their address in. I am simply sending it so as you can see that I was camping on their trail all the time. Now I want you to get after them just as soon as you can. SUE THE HELL OUT OF THEM. Get you a judgment then you can do something with them. You will never be able to do anything with just the account.

THEIR ADDRESS NOW IS MRS. ....., 18TH AND SHERMAN AVE., DENVER, COLORADO.

Now go after them.

Yours very truly,

R. W. McCLENDON.